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CRITICAL ANALYSIS OF STATUS OF INDIGENOUS PEOPLE AND PROTECTION OF THEIR RIGHTS WITH REFERENCE TO NATIONAL AND INTERNATIONAL PERSPECTIVE

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I. INTRODUCTION

Indigenous Peoples are a significant and important portion of humanity. Their heritage, their ways of life, their stewardship of this planet, and their cosmological insights are an invaluable treasure house for us all. Indigenous Peoples live in every region of the world. They live in climates ranging from Arctic cold to Amazon heat, and often claim a deep connection to their lands and natural environments. For many indigenous peoples, the natural world is a valued source of food, health, spirituality and identity. Land is both a critical resource that sustains life and a major cause of struggle and even death.

The term 'indigenous' derives from the Latin term *'indigena'*. It means 'native' used for the plants, animals, and peoples who come from a particular region. Its first known use was in the 1640s when it was applied to plants and cultures in the new world. The general sense of the term applied to that produced, growing, living, or occurring naturally in a particular region or environment; also, sometimes used as a synonym for 'native,' 'innate,' 'aborigine,' 'endemic,' and 'inborn.' The word 'indigenous' was first used officially by the United Nations Organization in 2002 in its political declaration of the world summit on sustainable development[1]. Prior to this the term was regarded as 'still under debate' for use in UN official documents.

Indian soil is enriched with diversity of race, cast, creed, ethnicity and culture with many customs, way of life, traditions and social belief followed by millions of people and from them Indigenous people known as significant Peoples. The Indigenous people of India called as *Adivasis*, represent the largest indigenous peoples within the borders of a state. According to the United Nation Organisation there are over 300 million indigenous people in the world and 70 million of them live in India, and the common terminology used is Adivasis. This terminology is derived from the Hindi word *Adi* which means from the beginning, *Vasi* means inhabitants so *Adivasis* simply means aboriginal people. Due to political awareness in the mid-19th century the term *Adivasis* got recognition but after independence when the Constitution was framed there new terminology was introduced for Indigenous people as scheduled tribe. But the scheduled tribe is not defined in the Constitution but it gives rights to authorities to notify who are included as scheduled tribe.

[1]The Journal of Environment & developmentvol. 12, No. 1 (March 2003), pp. 111-120 (10 pages) Published By: Sage Publications, Inc.

Indigenous people, *Adivasis*, scheduled tribe, native or aboriginal they all are loosely used as synonymous to each other and they are defined by many scholars or intellectuals. Martinez-Cobo defines indigenous people as "Those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[2]

Though all indigenous peoples of India are generally known as *Adivasis* and one common terminology is used for them but those people do not share same culture, language and ethnicity and do not fall into the homogenous group. Despite the fact that there are 705 legally recognized ethnic groups, there are many more that can come under the ambit of scheduled tribal status which are not officially recognized[3]. *Adivasis* are not a homogenous group in India; there are over 200 separate peoples who speak over 100 languages and are ethnically and culturally diverse. However, their style of life and widely regarded downtrodden status within Indian culture are identical. Unofficial estimates vary greatly, but they represent a substantially larger percentage of India's Peoples. *Adivasis* can be found all throughout India, however basically they are hailed from mountains and hilly areas or some time closer to the nature and away from fertile plains. According to the 2011 official Census in India indigenous people are 104 million in number, or 8.6% of the total Peoples of the country. India is by this count home to more tribal people than any country in the world, exceeded only by the continent of Africa taken as a whole. However, there are many claims that several ethnic communities should qualify as scheduled tribes (STs), but have not been officially recognized. The Indian Constitution recognizes 461 ethnic groups as STs but according to one estimate, the figure could be as high as 635.[4]

This is a significant number in absolute terms, but certain other aspects of tribal peoples in India are equally noteworthy. Tribal communities are dispersed in most parts of India, except in the states of Haryana, Jammu and Kashmir and Punjab, and the Union territories of Chandigarh, Delhi and Pondicherry. There are six major regions of tribal concentration, namely North-eastern region, Himalayan region, Central India region, Western India region, Southern India region, Island region, though all indigenous peoples of India are generally known as *Adivasis* and one common terminology is used for them, those people do not share the same culture, language and ethnicity and do not fall into the homogenous group. Despite the fact that there are 705 legally recognized ethnic groups, there are many more that can come under the ambit of scheduled tribal status which are not officially

[2] UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4. the conclusions and recommendations of the study, in Addendum [4], are also available as a United Nations sales publication (U.N. Sales No. E.86.XIV.3).

[3]ACHR, "Who are the Indigenous Peoples in India?" *INDIA: Human Rights Report Quarterly, Issue 2*, 2010, p. 67. Accessed 16, August 2016 from http://www.achrweb.org/ihrrq/issue2/ihrrq-oct-dec-2010.pdf

[4]Report of the high-level committee on socioeconomic, health and educational status of tribal communities of India, Xaxa Committee on Tribal Communities of India 2014. Chap 3 Geographical and Demographic Profile

recognized. *Adivasis* are not a homogenous group in India; there are over 200 separate peoples who speak over 100 languages and are ethnically and culturally diverse. However, their style of life and widely regarded downtrodden status within Indian culture are identical. Unofficial estimates vary greatly, but they represent a substantially larger percentage of India's Peoples. *Adivasis* can be found all throughout India, however basically they are hailed from mountains and hilly areas or some time closer to nature and away from fertile plains.

Indigenous people are got recognition on international level after United nation organisation established in 1945, it has passed covenants and conventions for protecting the identity, ethnicity and the rights, From past three decade united nation has been playing an important role of promoting and protecting rights of indigenous people by many convention and covenants, but Indigenous Peoples' rights come in purview with many other human rights declared by united nation. Due to lack of acceptance and negligence towards their culture and ethnicity many important Indigenous Peoples' rights are not framed in specific Indigenous Peoples' rights treaties, but became part of general treaties, for example the Universal Declaration of Human Rights. Even in municipal law indigenous people recognised nationally by the Constitution of India, and their fundamental rights are protected, they still face prejudice on various levels of their life, due to lack of systematic government policies. They do sometimes continue to suffer with discrimination in schools and exploitation in work places. They are not even able to learn their own languages in schools in many locations. They are robbed of sacred places and things as a result of unfair interference. Neglecting their right to live on and govern their ancestral lands, measures are frequently implemented to exploit the resources that have nourished them for ages. Governments have even enacted programmes of forced assimilation in order to eliminate Indigenous Peoples, cultures, and customs in some circumstances. In such a situation it is necessary to find out the provisions under international law regarding indigenous populations.

II. AIMS AND OBJECTIVES

The aims and objectives of this research are mentioned below:

a) To analyse the provisions of the international law relating to indigenous people.

b) To understand the will theory of right and interest theory of right as a base of the international law and municipal laws/policies relating to rights of the of the indigenous people.

c) To analyse the policies of demarcation of Indigenous people from the rest of the society adopted by the progressive democracies such as Australia, Brazil, Canada, New Zealand and similar policies adopted in the USA.

d) To understand the provisions and policies under Indian legal system for the protection of the rights and interest of indigenous people (scheduled tribes) in the light of international law relating to indigenous peoples and policies adopted by above-mentioned Democratic countries.

e) To analyse the contribution of the Indian higher judiciary for the protection of the rights and interest of indigenous people (scheduled tribes).

III. RESEARCH METHODOLOGY

Methodology is an important part of any research work. The present study is of Doctrinal type of research. This research work will be conducted by giving emphasis upon the research methods namely Analytical Research, Historical Research and Critical Research.

a) Analytical Research: Under analytical research researcher will make analysis/study of existing relevant international conventions, declaration, statutes and policies regarding indigenous peoples. Similarly, the intention of international organizations, legislatures, competent authorities for ascertaining the true meaning/nature of said conventions, declarations, statute, effect of custom and judicial pronouncements upon statute etc. along with the report of the international commission of jurists, Law commission if any submitted upon a relevant subject will be analyzed.

b) Historical Research: It will explain the process of gradual evolution of law. Historical research enables one to understand the causes for present law and the nature or trend of future law. Through historical research all the factors like history, geography, culture etc. can be studied to ascertain the true meaning of law. Accordingly, under this research method researchers will be studying the gradual evolution of the international human rights jurisprudence and international law regarding indigenous peoples.

c) Critical Research: The object of critical research is to ascertain common principles or norms; it is also called Normative Research. Finding out the defects in the existing laws and suggesting reforms is the concern of critical research. The necessary material is qualified law, policies, judicial observations and pronouncements, academic writings and public opinion.

For this research work researchers will use the primary as well as secondary sources, data in the form of International Conventions and Declarations, Statutes, Case Laws, Books, Journals, Newspapers, Magazines, etc. Researchers will also make use of Internet, Online Data and the libraries of Indian Law Institute, Indian Society of International Law, Mumbai, Pune and others Universities.

For this research work researcher will use the primary data in form of International Conventions & Declarations, statutes, case laws, reports of the International commission of jurist, reports of United Nations commission on human rights, reports of United Nations regarding indigenous peoples, reports of Amnesty International and online paid database like *Westlaw, LEXIS-NEXIS* and *Manu Patra*. Similarly, researchers will also be using the secondary data in the form of reference books, journals, newspapers, magazines, etc. Researchers will also be referring to the free-database which is in public domain through the internet. The researcher will be making physical use of the libraries of Indian Law Institute, Indian Society of International Law, and the libraries of the University of Mumbai, Pune and the library of Symbiosis Law School Pune.

IV. LITERATURE REVIEW

As a part of literature review the researcher has done research on various scholarly research article and books, stating the definition, history, role of indigenous people in contemporary era and what problem faced by them and how rights are protected by international and national organisation.

i) Corinne Lennox and Damien Short, "Handbook of Indigenous Peoples' Rights", Rutledge,1st edition (18 September 2018)[5]

In this reference book, the author of this book examining the rights of indigenous people, the author explores how these rights have been exercised and violated and how it have been changed protected and monitored by various international mechanism over the time. The author has given comprehensive interdisciplinary overview of indigenous peoples' rights, and political, legal social and philosophical issue and their relation between national and international norms. However, the author has not mentioned the struggled of land faced by the indigenous people and they have not covered the concept of demarcation based on the theory of right to development with theory of will and theory of interest. The researcher will focus on these theories and struggled faced by indigenous people with analogy and rationality.

ii) Virginius Xaxa , Vincent Ekka , Anabel Benjamin Bara & Juhi Priyanka Horo , "India's Indigenous Peoples: A Journey of Self Reflection on Culture, Society and Sustainability", Indian Social Institute New Delhi; First edition (10 September 2021)

The author in this reference book has generated multiple and diverse perspectives of Indigenous peoples is resourceful, author has given detailed history of indigenous people and peak of culture in Indian, and as society how they have evolved. The author in this book has given importance of education and change and the author also mentioned the knowledge, health and well being of indigenous people. The author in this book has given the concept of sustainability with the progress of indigenous people, the author in this book has not covered the socio economics of indigenous people and how it has affected by the albescence of the laws by government.

iii) Katja Göcke, "Indigenous Peoples in International Law", Göttingen University Press, 2013 Published[6]

[5]ISBN-10 : 1857439767

[6]open edition Books: 12 April 2017 Series: Gottingen Studies in Cultural Property Electronic ISBN: 9782821875487

In this research paper, the research scholar has provided an overview and analysis of the current and historic legal status of indigenous peoples in international law. The research scholar has defined "indigenous peoples" with various terminologies, the research scholar has discussed international law in brief, subsequently, an overview of the historical development of the rights and status of indigenous peoples and the current legal situation is mentioned in detail, and appraisal of the position of indigenous peoples in international law is given. The author has not interlinked the municipal laws and international law, in this research the researcher will find link between Municipal and international law regarding indigenous people.

iv) Patrick Thornberry, "Indigenous peoples and human rights", Manchester University Press, (2013)[7]

This book is a full-length study of the rights of indigenous peoples in international law, focusing in particular on instruments of human rights. The primary reference point is contemporary law, though the book also examines the history of indigenous peoples through the lens of historical legal discourses. The work critically assesses the politics of definition and analyses contested definitions and descriptions of indigenous groups. Most of the chapters are devoted to detailed examination of existing and emerging human rights texts at global and regional levels. Among the instruments considered in the book are the International Covenants on Human Rights, the UN Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination, the African Charter on Human and People's Rights, and the ILO Conventions on Indigenous and Tribal Peoples. In this research the researcher will find link between Municipal and international law regarding indigenous people.

v) P.K Nayak, "Revisiting Tribes and reconsidering Tribal Development" ADIVASI, (2000-2001)[8]

The paper "Revisiting Tribes and Reconsidering Tribal Development" begins with an assertion that failures of tribal development strategies are the failures of our appreciation of tribes, their cultures and societies. It throws new light on our basic assumptions regarding tribes dispelling some of our misconceptions by way of revisiting tribes. The author critically examines tribal development strategies and pleads for their reconsideration.

[7]EISBN: 9781847791221

[8]Vol 40 June to December 2000 and Vol 41 June to December 2001

vi) Nandini Sundar, the burning forest India's War in Bastar, Juggernaut (2016)[9]

The author has provided information about the conflict indigenous people had faced with Maoist and the government and provided a different prospective. Maoist and Other Armed Conflicts cast doubt on the binary. They provide a far more complex picture of the conflict and how it became increasingly violent from the early 2000s onward at one level; both books confirm the view of an armed conflict between Maoist rebels, or Naxalites, and the Indian state. On another level, both books open up a horrific black box of the mechanics of war and profit-making in a vast stretch of forest where people live in constant fear. The fear, which suffuses daily life, is double-edged for both the Adivasi communities and civil society groups. The author has provided the brutal scene of AFSPC 1958 and the attack on indigenous people, the researcher will research further in the matter relating the violent death of the indigenous people by armed force and Maoist.

vii) Bodhi S.R. Tribal Studies in India: Pre- and Post-Xaxa, Journal of Tribal Intellectual Collective India[10]

In this research paper, the research scholar has cited the condition of the indigenous people in two timeline the first timeline is discussing the socio condition of indigenous people before the XAXA committee and after it, this research paper has presented real struggles of indigenous people and the deterioration of the cultural and ethnic life after colonisation and the process of criminalisation they went through, and this led to misleading information regarding them. This paper has given broader framework of XAXA committee and the changed it brought in the life of tribal people in India after the report of committee, but the researcher this paper used a small timeline between 1992 to 2016 which is not enough for knowing the better condition of indigenous people, The researcher will focus on bigger timeline of indigenous people with analogy and rationality.

viii) James Anaya S., International human rights and Indigenous peoples, Aspen Publishing (2009)[11]

The author of this book is provides background on international indigenous rights movement that has given way to significant development concerning indigenous people within the United Nations and regional human rights system and major developments and their normative significance, including the adoption of and mechanism to implement the universal declaration of human rights on the rights of indigenous people and international labour organisation convention 169

[9]Latest edition (17 October 2016 ISBN-10 : 9789386228000

[10] ISSN: 2321-5437 JTICI Vol.6 (1), TN (1), 2022

[11]ISBN- 978-0-7355-6248-6

of indigenous and tribal people. The researcher will research on detail regarding the international laws on indigenous people.

ix) Rituraj Basumatary, Human Rights of Indigenous People in North East India, Notion press[12]

The author of the book has deals with the human rights of indigenous people in north east India and their issue of the right to self-determination. The author has described the right to determination and why it is important for the indigenous people of north. These people face immense discrimination in the forms of racism, inadequate participation in public life, the illegal use of their lands and cultural violence, the region has been facing the onslaught of multiple armed conflicts for many decades. The issues were aggravated after the introduction of the Armed Forces Special Power Act (AFSPA) in 1958.Author has described all the problem faced by the indigenous people, however this book only stated the problem with north east resign but did not mentioned about rest of the country, the researcher will focus on the overview of problem faced by the all the tribal people

v) RESEARCH PROBLEM

a. Whether provisions under the international law relating to indigenous peoples are adequate.
b. Whether On the similar lines by formulating suitable policies and by enacting relevant laws the rights and interest of indigenous peoples (scheduled tribes) in India are protected?
c. Whether the policies and laws regarding indigenous peoples (scheduled tribes) in India are governed by the interest theory of right and will theory of, right?
d. Whether will theory of right has not been implemented in the vibrant manner while determining policies and enacting laws for the welfare of indigenous peoples (scheduled tribes) in India?
e. Whether the ideal model of demarcating ‘exclusive tribal areas’ by adopting suitable policies and enacting laws implemented in the countries like Brazil, Australia, Canada, New Zealand and the steps taken on the similar lines in USA protects the interests and rights of indigenous peoples in those countries in better manner in comparison of India?

vi) HYPOTHESIS

[12]ISBN: 9781685540227

For convenience of formulation and to fix the boundaries of study following tentative premises are taken as hypotheses.

a) The provision under the international law and Indian Laws and policies relating to indigenous people are adequate and they are protecting their interest.
b) Indian Laws and policies regarding indigenous people are based on the interest theory of rights rather than will theory of rights.
c) Developing countries like USA, Brazil, Canada, New Zealand and Australia has adopted better model of demarcation of "exclusive tribal areas" by enacting laws and policies in comparison with India.
d) Problem of Naxlism and forceful conversion of indigenous people is gross violation of their human rights, and judiciary is playing important role in protecting their rights.

VII. SCOPE AND LIMITATION

A. The scope of the present research work will extend to the following areas and laws namely,

1. International human rights jurisprudence: International human right jurisprudence exists in form of the United Nations declaration on human rights 1948, international conventions on civil, political, economical, social and cultural rights 1966, Convention on the Prevention and Punishment of the Crime of Genocide 1951, another human rights conventions and declarations passed by the United Nations organization and regional international organizations.
2. Under present research work researcher will be making detailed analysis of the following international conventions and declarations regarding indigenous people,
    a. Convention on the elimination of all forms of racial discrimination 1996, b) Convention on the rights of the child 1990,
    b. Rio declaration of environment and development and agenda 21 year 1992,
    c. Convention on Biological Diversity 1992,
    d. International labour organization convention 169 year 1989,
    e. UNO's Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities 18 December 1992
    f. Vienna Declaration and Program of Action 1993,
    g. Report on the International Conference on pollution and development 1994,
    h. The United Nations declaration on the rights of indigenous peoples 2007, j) UNO's agencies for Indigenous Peoples' Human Rights such as
    i. UNO's Working Group on Indigenous Peoples'
    j. UNO's Permanent Forum on Indigenous Issues
    k. UNO's Working Group on the Draft Declaration on the Rights of Indigenous Peoples:
    l. UNO's Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples,
    m. Contribution of Other international Organization such as

n. European Union (EU) 'Council Resolution on Indigenous Peoples'
o. Other Organization like Organization for Security and Cooperation in Europe (OSCE), Organization of American States (OAS)
p. World Bank Operational Directive (1991).

3. The jurisprudence of interest theory of right and will theory of right and its influence on the policies of Brazil, Australia, Canada, New Zealand and USA.
4. The fundamental right to religion inclusive of the right to profess practice and propagate one's religion under Indian Constitution and nature of the activities of the conversionist in Indian tribal areas.
5. This research work even is possible to be undertaken with the non-doctrinal, empirical legal research method perhaps with the sponsorship and assistance of UNO or any of its agencies or European Union because it will surely be the vast research adventure etc. The present research work is possible to be conducted by giving special emphasize on the comparative laws / policies of India vis-à-vis Brazil, Australia, and USA.

B. LIMITATION OF STUDY

There are certain limitations of the present research work they are as follows,

i) Jurisdiction: – As apparent from the title of the thesis study of the international human right jurisprudence regarding indigenous people's protection regime under international law for the protection of the rights and interest of the Indigenous peoples giving special emphasis on the policies and laws of Brazil, Australia and USA is the exclusive jurisdiction of present research work.

ii) Time Limit: – The researcher is bound by the specified prescribed time limit to complete the research.

iii) Resource Material: – The researcher will refer to the reference books, online paid data, texts etc. which are accessible and the case laws if any which are fundamental in the context of international law for the protection of the rights and interest of the Indigenous peoples.

iv) Objectivity, Indian views and prejudices: – Maintaining objective attitude in research work is the fundamental requirement however any research h including this research is bound to carry some of the trappings of Indian views and prejudices pertaining problems/issues of protection of the rights and interest of the Indigenous peoples.

VIII. CHAPTERISATION

CHAPTER 1

INRODUCTION

It is believed that there are 300 to Almost 500 million indigenous people's community living in all over the world13 and speaking 7000languages of own. In India the number of indigenous people is almost one hundred million which is almost contain of 8.6 % of total population of India14. India is diverse country containing many tribes15 known as Adivasi. Adivasi is the collective term for the Tribes of the Indian subcontinent, who are considered to be the indigenous people of India. The Adivasis often enjoyed autonomy and, depending on region, evolved mixed hunter-gatherer and farming economies, controlling their lands as a joint patrimony of the tribe. In some areas, securing Adivasi approval and support was considered crucial by local rulers, and larger Adivasi groups were able to sustain their own kingdoms in central India.

During the period of Colonisation, the British administration encroached upon the Adivasi tribal system, and it caused massive widespread resentment against them, slowly it has given rise to feudalism and India Zamindari system rose to fame which led to widespread resentment. Indigenous people turned their back against British and it caused social gap, British supported Zamindari and had rapidly made the legal property, which in turn zamindars moved to extract the maximum economic benefit possible from their newfound property and subjects. Land dispossession by the zamindars or interference by the colonial Government resulted in a number of Adivasi revolts in the late eighteenth and early nineteenth centuries, there were tribal reform and rebellion movements during the period of the British Empire, some of which also participated in the Indian independence movement or attacked mission posts. Tribal rebellions in the nineteenth century resulted in British policy of exclusion of Tribal areas from the operation of general laws. Post independence, groups and communities identified and enumerated as tribes during British rule came to be re-classified as Scheduled Tribes after the Constitution (Article 342) was adopted in 1950. Indian policies and legal framework after independence on commencement of the Constitution can be studied in Chapter Three. It is pertinent to note that under the Indian legal system rather than the term indigenous population the term scheduled tribe has been used16.So in India Indigenous people have distinct identity which is protected by laws and our constitution, judiciary and government is working to protect it, but after all the efforts taken by all branches of government indigenous people suffer a lot They have been fighting for the protection of their collective right to self-determination, autonomy and identity, and for reclaiming their rights over land, territories and natural resources for centuries. There are many indigenous powerful mass movements are for fighting for these rights that took place in the recent past.

After many years of exploitation, the Indigenous people has suffered problem such poverty, ignorance, economically backwardness, problem of illiteracy and unemployment, lack of there social and rooted work. The indigenous children's health is at stake due to less nutrition

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[13]M. D. Cole, *Das Selbstbestimmungsrecht indigener Völker: Eine völkerrechtliche Bestandsaufnahme am Beispiel der Native Americans in den USA* (2009),

[14]The 2001 Government of India Census recorded 8.2 per cent of India's population as tribal.

[15]There are 622 recognized tribes in India. See Ministry of Tribal Affairs, Government of India, Online: <http://tribal.nic.in/index1.html>.

[16]Indian constitution DD Basu 2010 edition

food and they are living without any proper medical facility, there lack of acceptance of their identity in mainstream. They are facing the situation like rapid growth development on their land without providing them any alternative land they are losing their ancestral property making them dependent, [17]They live in hilly, forested and semi-arid areas generally backward in terms of social and economic development and are considered negative areas from the point of view of supporting large population and economic growth. Since many tribal areas are rich in mineral and forest resources these have attracted non-tribal groups skilled in superior technology for exploitation. This has caused damage to tribal ecology and culture and generated another social tension. In fact, there is a great deal of debate whether to preserve tribal culture and its environs or to encourage their change keeping in mind the need of the hour[18]

CHAPTER 2

RIGHTS OF INDIGENOUS PEOPLE: INTERNATIONAL PERSPECTIVE

From past three decade UNO has been playing an important role of promoting and protecting rights of indigenous people by many convention and covenants, but indigenous peoples' rights come in purview with many other human rights declared by UNO. Due to lack of acceptance and negligence towards their culture and ethnicity many of their important rights are not framed in specific treaties relating to the indigenous peoples, but became part of general treaties, for example the Universal Declaration of Human Rights, After World War II UNO has played vital role for preserving the cultural and social and ethnic rights'. UN has defined the terminology indigenous in Martinez cobo study. That study has offered intellectual framework for study of culture and historical continuity of land. International law guarantees rights to indigenous peoples regarding traditional lands, knowledge, cultural preservation, and human security. **International law relating to indigenous peoples exists in form conventions and declarations on the human rights which do operate as a base of the same, as UDHR[19]**This is general instrument which protect Indigenous people right of equality and many other rights to which other people are entitled. There are various conventions which protect Indigenous people from racial discrimination, genocide, apartheid, convention for protecting their bio-diversity and their ethnicity, Special Convention for working group of indigenous people. There is Various International Organisation also play important role OSCE[20], OAS[21] , European Union these union keep close eyes on matters relating to Indigenous people.

International labor organization has been engaged in indigenous people's rights since 1920, it is responsible for the indigenous and tribal people's conventions, 1989[22]. In this convention ILO[23] passed the resolution regarding safeguarding the basic rights of the

[17]https://cjp.org.in/wp-content/uploads/2019/10/2014-Xaxa-Tribal-Committee-Report.pdf
[18]https://www.clearias.com/scheduled-tribes-in-india/

[19]a) Universal Declaration of Human Rights UDHR 1948

[20] Organisation for Security and cooperation in Europe
[21]Organization of America
[22] (169) https://www.ilo.org/dyn/normlex/en/f?P=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169
[23]International labor organization 1920

indigenous people and protecting their land from any kind of arbitration. In 1993 UN has passed a resolution in general assembly declaring that year as International Year of the World's Indigenous People. In 2000 UN has setup a permanent forum on indigenous issue, in 2007 UN adopted The Declaration on the rights of Indigenous Peoples, and this declaration was most comprehensive statements of rights of indigenous people ever developed.

a) Universal Declaration of Human Rights UDHR 1948: This is general instrument which protect Indigenous people right of equality and many other rights to which other people are entitled.

b) Convention on the Prevention and Punishment of the Crime of Genocide 1951: This convention took place after learning lesson from World War II; this convention has defined Genocide which means any of the following acts which have the intention of destroying, in whole or in part, a national, ethnical, racial or religious group.

c) International Covenant on Civil and Political Rights 1966: This Covenant outlines the basic civil and political rights of individuals. There are also provisions for collective rights.

d) International Covenant on Economic, Social and Cultural Rights 1966: This Covenant describes the basic economic, social, and cultural rights of individuals. It also has a provision for collective rights.

International law on indigenous Peoples consists of following international conventions and declarations passed for the protection of rights and interest of indigenous peoples.

a) Convention on the elimination of all forms of racial discrimination 1996: According to Article 1 of this convention "When race, descent, color, ethnicity, nationality, etc. become the basis of any kind of discrimination, prohibition, exclusion, unfair treatment, preference, or restriction, with evil intention then it is defined as Racial discrimination".

b) Convention on the rights of the child 1990: Article 30 states that children of minorities or indigenous origin shall not be denied the right to their own culture, religion or language. (Article 30) have been duly included in the Convention.

c) Rio declaration of environment and development and agenda 21 year 1992: The Principle 22 of the Rio Declaration states that the unique special relationship of Indigenous people with their lands can be found. The traditional knowledge, years of experience, close bond with their lands and the environment in general contributes to the effective management as well as development of the environment.

d) Convention on Biological Diversity 1992: Article 8(j) of the Convention specifies that all of its signatories must respect, maintain and preserve its knowledge, practices and innovations of local indigenous communities which till date follow the traditional lifestyle.

e) International labor organization convention 169 year 1989: The very first introduction of the human rights of Indigenous people and their specific needs at global level was held at an International convention in The ILO Indigenous and Tribal people's Convention. The main underlying objective of the convention was to outline the protection and promotion responsibilities of the government.

f) UNO's Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities 18 December 1992: The Declaration is made keeping in mind not just the rights of National or ethnic, cultural, religious or linguistic identity of minorities but also the state's obligations towards it. It speaks about the exercise of minority rights, both individual and in groups.

g) Vienna Declaration and Program of Action 1993: indigenous people inherit dignity and unique contributions to development of society have always reaffirmed the strong commitments of the international community towards their well being in all aspects have been recognized in this declaration.

h) Report on the International Conference on pollution and development 1994: The agreement made as per the conference suggest that the Peoples, development or environmental programs affecting the indigenous people must include their own needs as well as their perspective and must accordingly receive appropriate and sufficient socio-cultural and ecological services as mentioned in the declaration. Durban declaration and program of action 2001

i) The United Nations declaration on the rights of indigenous peoples 2007: On 13th December 2007, with a 144 vote's strong favorable majority, the United Nations General Assembly adopted the United Nations Declaration on the rights of indigenous people. It includes every minute detail and it is basically a document including the rights of Indigenous people, minimum standards for recognition, etc., The Declaration constantly provides guidance to the Indigenous people as well as the States. It also useful to address their claims and is a guiding light for the States for the development of relevant policies and laws.

j) United Nations Organs for Indigenous Peoples' Human Rights:

> i) UNO's Working Group on Indigenous Peoples: Its function involves the reviewing of the protection of the indigenous people along with its promotion. It keeps a close eye on the developments related to it. Setting of international standards of the rights and freedoms of indigenous people has also been an area of activity of the committee.
>
> ii) UNO's Permanent Forum on Indigenous Issues: In 2000, the Economic and Social Council (ECOSOC), one of the six main organs of the United Nations, established the Permanent Forum on Indigenous Issues to consider a wide range of issues affecting Indigenous Peoples.

iii) UNO's Working Group on the Draft Declaration on the Rights of Indigenous Peoples: This Working Group of the Commission on Human Rights meets once a year and is responsible for reviewing and debating the draft Declaration.

iv) UNO's Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples. His mandate is as follows to gather information on violations of human rights and fundamental freedoms of Indigenous Peoples, to formulate recommendations to prevent and remedy such violations and to work together with other experts of the UNO's Commission on Human Rights.

k) Role of the Other Organizations:

a) There is certain organization has played very important role for protecting the rights promoting cultural ethnicity of Indigenous people and one them is European Union (EU)Which has passed a resolution in 1998 known as 'Council Resolution on Indigenous Peoples' within the Framework of the Development Cooperation of the Community and Members States.

b) Other Organization like Organization for Security and Cooperation in Europe (OSCE), Organization of American States (OAS) identify and seek early resolution of ethnic tensions that might endanger peace, stability or friendly relations among them and treats Indigenous Peoples like any other national minority, rather giving them any special status. There was in 1977 a proposed American declaration on the rights of indigenous peoples was introduced providing certain rights to the indigenous people.

c) World Bank Operational Directive (1991): It addresses economic issues (technical assistance and investment project mechanisms) concerning Indigenous Peoples.

Indigenous people's development is an issue worldwide is faced by them; the governments in the name of development are violating their fundamental rights of first generation and second generation. The theories of rights are divided into mainly interest theory and will theory and the utilization of these theories is for protection of the Indigenous people.

The Interest Theory approach: Advocates of the interest theory approach argue that the principal function of human rights is to protect and promote certain essential human interests. Securing human beings' essential interests is the principal ground upon which human rights may be morally justified. The interests approach is thus primarily concerned to identify the social and biological prerequisites for human beings leading a minimally good life. The universality of human rights is grounded in what are considered to be some basic, indispensable, attributes for human well-being, which all of us are deemed necessarily to share. Thus, under interest theory of right irrespective of the wishes and traditional life pattern of the indigenous people's state is duty-bound to provide them basic rights which are prerequisites for the enjoyment of human rights.

The Will Theory approach: In contrast to the interests approach, the will theory attempts to establish the philosophical validity of human rights upon a single human attribute: the capacity for freedom. Will theorists argue that what is distinctive about human agency is the capacity for freedom and that this ought to constitute the core of any account of rights. Ultimately, then, will theorists view human rights as originating in, or reducible to, a single, constitutive right, or alternatively, a highly limited set of purportedly fundamental attributes. Professor *H.L.A. Hart*, for example, inferentially argues that all rights are reducible to a single, fundamental right. He refers to this as 'equal right of all men to be free.' Professor *Hart* insists that rights to such things as political participation or to an adequate diet, for example, are ultimately reducible to, and derivative of, individuals' equal right to liberty.

Thus, under will theory of right human rights are possible to be synchronised in form of single right. In context of the rights of the indigenous peoples there right to preserve traditional culture and life pattern as a part of their sweet choice is at par with the fulfilment of human rights. Therefore, will theory of right doesn't allow the state to impose its perceptions about the development on the indigenous people.

The interest theory of the rights and will theory of the rights as discussed in this chapter implicit in the international law relating to protection of indigenous people. The progressive democracies like Australia, Canada, Brazil, New Zealand and USA have adopted these theories in their municipal policies and laws pertaining protection of rights of indigenous people.

The policies and laws of Australia, Canada, Brazil, New Zealand and USA regarding demarcation of the indigenous people: In the course of colonization indigenous peoples lost ownership and control over most of their ancestral lands, and from the end of the 19th century onwards the existence of inherent indigenous land rights, i.e. rights not derived from the colonial powers but rooted solely in the use and ownership of the land by indigenous peoples since time immemorial, had been completely denied. In Canada, New Zealand, and the USA an aboriginal title is regarded as an exclusive right to the land itself, i.e. the right to the land is not limited to traditional activities. One of the most pressing issues for indigenous peoples around the globe is the state recognition and demarcation of the traditional land rights of indigenous peoples.

In Australia The Native Title Act 1993 (NTA) provides determination of native title, claims, uses aboriginal customary law as the basis and standard of proof for the recognition of native title[24]. The **Brazil provide** 'Demarcation' (or marking out) of indigenous land is part of the administrative process that leads to the official recognition of the territorial rights of indigenous populations. The 1988 Constitution of Brazil took a bold step forward Article 231 speaks that, "Indians shall have their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property[25].

[24]https://www.amnesty.org.au/campaigns/indigenousjustice/?Cn=trd&mc=click&pli=23501504&pluid=0&ord={timestamp}&gclid=cjwkcajw586hbhbreiwaqyenhdbhrbur69iqrfghm-uhpjhaljakuf76wggz-itsjvck7ci5bhhobhocmf4qavd_bwe

[25]https://www.iwgia.org/en/brazil.

USA has taken step towards Indigenous peoples and their members have the right under Article XXIII of the American Declaration of the Rights and Duties of Man and under Article 21 of the American convention on human rights to delimitation and demarcation of their territory by the State. The right of the indigenous peoples namely the right of the recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community's integrity[26]. **IN Canada** The Constitution Act of 1982 recognized and affirmed the existing Aboriginal and treaty rights of indigenous peoples in Section 35. This Constitutional recognition has formed the legal basis for subsequent claims by indigenous people to uphold their aboriginal title rights in their traditional territories. Thus, in above-mentioned progressive democracies international human rights jurisprudence, interest and will theory of rights subsists having special features of the policy and laws of demarcation for the indigenous people[27].

CHAPTER 3

RIGHTS OF THE INDIGENOUS PEOPLE: NATIONAL PERSPECTIVE

After Independence under the leadership of first Prime Minister of India Pundit Jawaharlal Nehru there was five year plan policy regarding indigenous peoples in India was adopted, those policy were Encouragement to Indigenous Traditional arts and culture, Rights of Land forest should be respected, Indigenous people should be introduce in Administrative and development of them, avoidance of other, Less Administrative with multiple Schemes but with coloration with their culture and tradition and Development Should Judge by the human evolvement.

India doesn't recognize tribes as indigenous people. India ratified the International Labor Organization (ILO) Convention number 107 on Indigenous and Tribal Peoples of the United Nations (1957). Indian Government has recognized the status of indigenous people on international platform but it has also declared every Indian as indigenous and has taken a stand that it has provided all fundamental rights and protection to them. Indian constitution preamble states the character and aspiration of our country in form of justice, liberty, equality, secular, socialist, sovereign, democratic, and fraternity. So indigenous people will treat as equal in by our constitution and applicability of law will be equal, there certain articles of constitution which is specifically meant for Indigenous people

The Constitution of India grouped these ethnic groups together "as targets for social and economic development. Since that time the *Adivasis* of India has been known officially as Scheduled Tribes." Article 366[28] defined scheduled tribes as "such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution". The criterion followed for specification of a community, as scheduled tribes are indications of primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at

[26]CALIFORNIA Indian legal service report , https://www.calindian.org/our-offices/

[27]https://www.amnesty.org.au/campaigns/indigenous-justice/

large, and backwardness. This criterion is not spelt out in the Constitution but has become well established.

There has been an array of federal and state-specific legislations for the protection of tribal communities and regions from exploitation since Independence. Some are relevant for both scheduled tribes and scheduled castes, such as the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Some apply to all disadvantaged groups, of which tribal's would generally be expected to constitute a significant proportion. These would include state-specific laws to regulate money lending and to prevent usury, the Bonded Labor System (Abolition) Act, 1976, the Minimum Wages Act, 1948 and the Child Labor (Prohibition and Regulation) Act, 1986, The Forest Conservation Act, 1980 provides that the use of forest land for industrial purpose is prohibitory if tribal are already inhibited and have the authority on the land as forest is home to Indigenous people. The Forest Rights Act of 2006, The Panchayat (Extension to Scheduled Areas) Act 1996, despite the existence of such a radical piece of legislation for social justice for tribal, its implementation in most districts of the state has not been in consonance with both the letter and the spirit of the law.

Challenges: Above-mentioned Constitutional and statutory provisions do broadly deal with two issues of scheduled tribes namely development and protection. And yet on both these issues, the outcome for tribal communities has been mixed.

a) Armed conflict (NAXALISM) in tribal areas with the state agencies i.e. police, Special Forces, administrative authorities are affecting tribal peoples. Armed conflict between the Communist Party of India (Maoist) and the Indian state, which is ongoing in parts of the states of Maharashtra, Andhra Pradesh, Madhya Pradesh, Chhattisgarh, Jharkhand, Bihar, Odisha and West Bangal has brought disastrous effect for the scheduled tribes. Maoists have a larger goal of capturing state power through protracted guerrilla war. The conflict has escalated in recent years particularly in central India; following the initiation by the state of a counter-insurgency operation against Naxalites (members of the Communist Party of India Maoist consisting of scheduled tribe people as well those were responsible for rapes, murders, arson, looting and intimidation in the name of defeating the Maoists. In Northeast there are conflicts between the state and tribal groups, between different tribes, and between tribes and non-tribal groups – although the state is also involved in all of these conflicts.

Abject poverty, excessive exploitation of the people by the moneylenders, landlords and usurers, underdevelopment of the region and state exploitation are usually some of the factors ascribed by various scholars and agencies which have been compelled the tribes to side with the Maoist cadres. **Armed Forces (Special Powers) Act, 1958** is in operation in the states of Manipur, Assam and Nagaland as well as parts of Tripura and Arunachal Pradesh. This Act gives considerable powers to the armed forces to arrest and search without warrant as well as shoots to kill on mere suspicion, once an area has been declared as 'disturbed'. Many cases of extra-judicial killings, rapes and harassment by armed forces have been reported in these States against people belonging to scheduled tribes.

b)<u>Fraudulent Conversion :</u>In India indigenous people Belongs to variety of culture and ethnicity many of those does not belongs to any kind of religion but do you too colonisation over India for more than 200 years lead to conversion of tribal people in other religion. The Christian missionaries and other conversion group has played a vital role of spreading their religion by giving them lure of better status in society or giving them monetary benefits to the people, due to that the indigenous people has lost their identity and they are deprived of their cultural roots. There are many cases in present day where the literature of customs, tradition and they the way of life is irrecoverable because of this conversion done by them , north eastern part of India is majorly influenced by them, the conversionist has trick the indigenous people my making them believe that their practises and belief is not true. It is widely believe that the rate of conversion increased after India colonised by British. The Practice of conversion is still going on in different tribal states or areas. It could be called a modern social problem or even a national issue because it causes non-tribalization of the tribal's and the tribal identity and culture are on the verge of being destroyed.

CHAPTER 4

ROLE OF JUDICIARY IN PROTECTING THE RIGHTS OF THE INDIGENOUS PEOPLE

In India Administrative system is divided into three pillars namely legislature, executive and Judiciary. India as being one of the largest democracy follows the principal of montesques's theory separation of power and judiciary in India is independent and no branch of government interfere in each other's functions, the function of judiciary is interprets the laws, settle disputes it also administers justice to all citizen. It is also called as watchdog of democracy and also guardian. Indian judiciary is protecting the rights of Indigenous people by keeping close eyes on the problem faced by them. Through Judicial activism the Indian Judiciary in current centaury has tried to break the shackles created by colonial prowess on Indigenous people, due to indignity of the custom and way of life they are having. Indigenous people has been deprived through ages and centuries together in the realm of darkness and discrimination, these people have been pushed to dark which led to them complete extinction them from their natural habitat. The judiciary has felt this need to provide justice and equality to them and to protect these peoples from being further deteriorated and also to understand the international obligation of the nations to provide justice to these peoples.

Indigenous and tribal people got their recognition after such long period where they were disrespected and there custom were disregarded, they lost their land, resource to livelihood, were criminalized, they suffered a lot but after independence Judiciary has closely administered the rights of indigenous people of India, the Human Rights jurisprudence relating to the protection of tribal rights flourished in India with the aid and influence of the judgments of the Supreme Court and the High Court of different states. Indian courts have pressed hard to redeem this position in a number of cases but the intention of the legislature and the executive to provide relief has been far from satisfactory. The directions given by the High Court and the Supreme Court of our country has not been adhered in a number of cases and the lack of persuasion by the tribal communities due to the lack of modern education and financial capacity

has left them with the continuing degradable conditions. The cases are following where the courts have protected the basic rights of Indigenous people:

Banwasi Seva Ashram vs. State Of UP and Ors.[29] In this case the court ordered that land declared by the Uttar Pradesh government as reserved forest is not part of the filed writ petition, in this case court has decided the dispute between Uttar Pradesh government and tribal people, the court appointed some district judges and their offices to administer the proceeding done by the said government, appointment made for the benefit of tribal people, to provide them legal aid or any help them in resolving any other matter. The court had given direction to government to provide the funds; the state must implement any claims if they are successful. **Bipin Chandra vs. state of Gujarat**[30] In this case the Gujarat high court has decided that in natural calamities its responsibility of state has to provide services to its citizen without any discrimination.

In Olga Tellis[31]this case is land mark judgement of the Supreme Court which held that the right to life, as set out in Article 21 of the Constitution it included means of subsistence, and obligation of state to provide adequate means. **Samantha vs. State of Andhra Pradesh**[32]A writ petition was filed by Samantha, a social action group working for the rights of tribal in the High Court of Andhra Pradesh in 1993 on the ground that the government was also a 'person' and hence does not have the power to grant lease in a scheduled area to non tribal for mining purpose. The Court recognised the 73rd Constitution Amendment Act and the Andhra Pradesh Panchayat Raj (Extension to Scheduled Areas) Act by stating that the Gram Sabah's shall be competent to safeguard and preserve community resources and thereby reiterated the need to give the right of self governance to tribal. The Court also felt that it would be appropriate to constitute a conference of chief ministers and concerned union ministers to take a policy decision so as to bring about a suitable enactment for a Consistent scheme throughout the country in respect of tribal lands and exploitation of mineral wealth.

Orissa Mining Corporation Ltd vs. Ministry Of Environment & Forest[33]Poor Adivasis known as Kotwalias and Vansfodias have preferred these writ petitions making a grievance that they are being harassed by the officers of the Forest Department with a view to depriving them of the privileges conferred upon them by the State Government. The order passed by the learned single Judge dated 24th July, 1981 is set aside, and a writ of mandamus is directed to issue against the officers of the Forest Department to the effect that they will not treat articles prepared from bamboos as 'forest-produce' and interfere with the transit thereof as such fro the forest area to the non-forest area. **Nandini Sundar v State of Chhattisgarh**[34] The main issue in this case involved was to clearly analyze the issue of appointment of tribal people as Special Police Officers or SPO by the Chhattisgarh Government In **Fatesang Gimba Vasava v. the State of Gujarat**[35], the Gujarat High Court ruled that the forest department's action to prevent the transport of bamboo for sale to tribal at concessional rates was

[29]AIR 1987 SC374
[30]AIR 2002 Guj 99, (2001) 2 GLR 1394
[31]*Olga Tellis v. Bombay Municipal Corporation*

[33]WP (Civil) No 180 of 2011
[34] 250 OF 2007
[35]AIR 1987 Guj 9, (1987) 1 GLR 219

unwarranted.**Sanjay Lodha vs. State of Jharkhand and Other**[36]This case was to determine whether Adivasi population in Jharkhand falls within the purview of the definition of forest produce. Apart from protecting the right of forest produce within the reach of tribal, the courts in India has played a dominant role in protecting the land rights of these peoples.

One of the leading cases in this regard is **Sri Machegowda v. State of Karnataka**[37]. Another case of uplifting the right to tribal people upon their land was **P. Rami Reddy v. The State of Andhra Pradesh**[38]**.**A revolutionary judgment that changed the outlook of the entire country was the famous case involving the rape of a tribal girl. Famously known as the Mathura Rape case, this case led to the amendment the criminal law in force in India. **Mathura Rape Case** [39](1972) led to the large scale protest amongst common Indians and virtually forced the alteration of rape laws in India. Mathura, a young tribal woman, was raped by two constables within the premises of the Desai Ganj Police Station in Chandrapur district of Maharashtra.

It must be noted is that mere legislation will not suffice to protect the tribal against the market forces which are based on tribal exploitation and deprivation and more explicitly on the colonial structure and philosophy. Only laws implemented in conjunction with social activists, and raising tribal consciousness, can checkmate this process. Such activism should come from the judiciary both including the judges and the prominent advocates who devote their life and profession for humanity and to abjure violence.

CHAPTER 5

CONCLUSION AND SUGGESTION

Government of India is party to all important international conventions, declarations on international human rights jurisprudence which do operate as a base of international law relating to indigenous people. India is a state party to the UNO's declaration on the rights of indigenous people 2007 however it has made certain reservations. The Indian Government has recognized the status of indigenous people on an international platform but it has also declared every Indian as indigenous and has taken a stand that it has provided all fundamental rights and protection to them.

India is the country of diversity and has also been blessed with enriched ethnicity and culture. It has coined the new name of indigenous people as scheduled tribe. Indian Constitution which is a fundamental law of land has given directions to all branches of Government for the protection of the interest of Indigenous people (scheduled tribe). The Constitution of India consists of all kinds of civil, political and economical rights for Indian people. The forefathers of the Constitution have specified the National sublime objective in the Constitution i.e. protection of the educational, economical, political and cultural rights and interests of the socially backward classes including indigenous people (scheduled tribe). However, efforts of the state do not seem to have yielded desired effects. Moreover scheduled tribe areas in India are also facing the arbitrary interference of Naxalites and Christian missionaries. Therefore

[36]AIR 2003 Jhar 64, 2003 (1) JCR 641 Jhr
[37]ILR 1991 KAR 3830, 1992 (1) KarLJ 323
[38]1988 AIR 1626, 1988 SCR Supl. (1) 443
[39]Tuka Ram And Anr vs State Of Maharashtra on 15 September, 1978

researcher is inclined to make thorough analysis of the international law relating to indigenous peoples, policy of the demarcation of areas for the indigenous people adopted by certain Democratic countries so that relevant recommendations addressing the issues faced by scheduled tribes in India will be possible to be made.

Indian policies and laws seem to be leaning in favor of interest theory of rights discarding will theory of rights. The will and wishes of the scheduled tribes regarding their perception of development and life pattern appears to be neglected. **The policy of the absolute demarcation of the scheduled tribes** with the rest of the society in the letter and spirit, in the prima facie manner **seems to be absolutely absent** in the Indian legal system.

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